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Supreme Court of the United States.

OCTOBER TERM, 1906.

Nos. 278 and 279.

APR 12 1907

JAMES H. MCKENNEY,

MAYER S. BERNHEIMER ET AL., as Executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

MAX DREY ET ALS., as Executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM G. WILSON,
C. A. SEVERANCE,
Of Counsel.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

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These two cases are identical in the questions presented, and even in the amounts of the two judgments in the Circuit Court, and are, by stipulation, to be heard together on a single record.

They come to this Court on writs of error to the Circuit Court of the United States for the Southern District of New York, to review the judgments rendered therein upon verdicts directed by the court, upon the trial of the two actions before the Hon. GEORGE C. HOLT and a jury. The actions were tried on March 9, 1906, and the verdict in each case was the sum of $4,275.

The two actions were brought by the defendant in error, Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, a corporation of the State of Minnesota, to enforce the individual liability of Simon Bernheimer and Isaac Bernheimer, under the Constitution of Minnesota, as stockholders in that company; and the original defendants, the plaintiffs in error, are respectively the executors of Simon Bernheimer and Isaac Bernheimer, both of whom had died before the actions were begun.

The cases were tried upon an agreed statement of facts (25, 28).

Statement.

The Minnesota Thresher Manufacturing Company was incorporated under the laws of the State of Minnesota on December 5, 1884. The purpose for which it was formed is set forth in the certificate of incorporation as follows:

"The objects for which this corporation is formed are the purchase of the capital stock, evidence of indebtedness issued by it, and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood and iron or either of them form the principal compo-

nent parts, and the manufacture of the materials therein used " (35).

These " assets of the Northwestern Manufacturing and Car Co." comprised bills receivable and accrued interest valued at $1,524,007.48 (38) consisting mainly of " farmers' notes ", given in payment or part payment for machines purchased, which it was thought would be collectible in the hands of a company prepared to keep those machines in repair (30-31).

At that time the Northwestern Manufacturing and Car Company was in the hands of a Receiver appointed by the District Court of Washington County, Minnesota; and the Receiver carried on its business under the orders of the Court (26).

On October 27, 1887, under order of the court, the property and plant of the Northwestern Manufacturing and Car Company, including all bills receivable, farmer's notes and other assets, which had been acquired by it or by the Receiver in the conduct of its business were sold to and purchased by the Minnesota Thresher Manufacturing Company. And on January 5, 1888, the same were conveyed to the last named company by the Master appointed by the court to make such conveyance. And shortly thereafter the Thresher Company entered upon the conduct of its business and continued therein until December, 1900 (40).

On December 14, 1900, the property and business of the Thresher Company were placed in the hands of a Receiver by order of the Circuit Court of the United States for the District of Minnesota in a suit for the foreclosure of a mortgage upon its property, and this Receiver continued the business until the mortgaged property was sold under decree of foreclosure on May 25, 1901; the property so sold was conveyed to the purchaser on July 8, 1901 (40).

On May 6, 1901, the Merchants National Bank of St. Paul obtained a judgment in the District Court of Ramsey County, Minnesota, against the Thresher Company; and, executions thereon having been returned wholly unsatisfied, the judgment creditor brought suit against the Thresher Company for the

appointment of a receiver and the enforcement of the individual liability of its stockholders in the District Court of Washington County, Minnesota, and the plaintiff was appointed Receiver therein on August 16, 1901, and qualified, and entered upon the discharge of his duties and still continues therein (26-27, 54-55).

The plaintiff, as such Receiver, did not come into the possession of any property or assets of the Thresher Company other than the books and records of that company and such right as was vested by him by law and by the orders and decree of the District Court of Minnesota to enforce the individual liability of the stockholders of the company (27).

Thereafter, in said suit in the District Court of Washington County, Minnesota, such further proceedings were had in conformity with the provisions of the statutes of Minnesota set forth in the complaint herein that an order was made in that suit, dated December 22, 1902, reciting among other things that it appeared to the satisfaction of the court that copies of the order of April 16, 1902, directing notice to parties interested were duly published, mailed and served in the manner therein prescribed, and that due notice of said hearing was duly given to the defendant company and to each stockholder of record as directed by said order, and that a hearing was duly had thereunder; and thereupon ordering that an assessment of thirty six per cent. of the par value of each share of the capital stock of the Thresher Company, to wit, the sum of eighteen dollars upon each share thereof be and the same hereby is assessed upon and against each and every share of said capital stock, and upon and against the person, corporation or party liable as a stockholder, and that each and every person, corporation or party liable as such stockholder be and he is hereby directed to pay to said Receiver—the plaintiff herein—at his office in the City of Stillwater, Washington County, Minnesota, within thirty days after the date of the order said sum of eighteen dollars per share; and further ordering that said Receiver upon failure to pay the amount assessed against any shares of stock within the time

specified, forthwith institute and prosecute such action or actions or other proceedings against the parties liable in any court having jurisdiction, whether in the State of Minnesota, or elsewhere, as he should deem necessary or proper for the recovery of the same (27, 65–67).

On appeal to the Supreme Court of Minnesota this order was affirmed (27, 68–72).

The two decedents, Simon Bernheimer and Isaac Bernheimer, were in their lifetime residents of New York, as are also the defendants, their executors, and neither they nor any of the defendants ever resided in the State of Minnesota or were served with process therein. Notices of the above mentioned proceedings were mailed by the Receiver to Simon Bernheimer and Isaac Bernheimer addressed to them at No. 320 Broadway, New York City, that being their address on the books of the Thresher Company, and at the time of such mailing the Receiver did not know of the death of either of them (101, 122).

Upon the admitted facts the argument here presented on behalf of the defendant in error rests upon the following propositions which, in their succession, lead to the conclusion that the judgments of the Circuit Court should be affirmed.

1. The plaintiff, as Receiver, is entitled to maintain actions in New York, inasmuch as the individual liabilities of the stockholders are assets, vested in the Receiver.

2. The obligations and liabilities of the stockholders rest upon a contract in which they submit themselves to the jurisdiction and control of the State of Minnesota.

3. The legislation of the State of Minnesota in providing an effectual remedy for enforcing the obligations and liabilities of the stockholders does not impair the obligation of their contracts.

4. The assessment made by the Minnesota court is conclusive upon the stockholders.

5. The stockholders' liability is statutory as well as contractual.

It is hardly necessary to point out that the Stock Corporation Law, of New York, relates only to New York corporations and to foreign corporations doing business in New York, and does not assume either to fix and declare, in § 54, the liabilities of stockholders in corporations of other states, or to fix and declare, in § 55, the limitation of liabilities of stockholders in corporations of other states. Nor would it be competent for the legislature of New York to say when and under what circumstances a stockholder in a corporation of another state should cease to be such stockholder.

The statute of limitations of New York applicable to this and to all cases is contained in the New York Code of Civil Procedure, Chapter IV, and the limitation upon an action to recover upon a liability created by statute is six years (§ 382), excepting where the action is against "a director or stockholder of a moneyed corporation, or banking association," in which case the limitation is three years (§ 394).

POINT FIRST. The plaintiff, as Receiver, is entitled to maintain actions in New York and elsewhere to enforce the individual liabilities of the defendant's testators and other stockholders, inasmuch as those liabilities are made assets for the payment of corporate obligations and are vested in the Receiver.

The individual liability of stockholders in Minnesota corporations arises under Section 3 of Article X of the Minnesota constitution. The language is :

" Liabilities of Stockholders. Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

This provision is self executing, as was held in *Willis v. Mabon*, 48 Minn. 140 and *McKusick v. Seymour, Sabin & Co.*, 48 Minn. 158. " The liability of a stockholder is fixed and measured by the constitution *alone*." *Willis v. Mabon* was approved in this respect by this court in *Whitman v. Oxford National Bank*, 176 U. S., 559, 562. Thus the constitution, in this particular, had the effect of a superior statute, passed by the People of the State in the direct exercise of their sovereign power, and its effect, as establishing and fixing the liability of stockholders was not subject to alteration or diminution by any power less than that which had created it. That is, nothing less than an amendment to the constitution, could limit or take away this liability.

The Minnesota Thresher Co., the corporation of which the plaintiff is Receiver and the defendants are stockholders, is not within the class excepted by the terms of the constitution. This was held in *State v. Minnesota Thresher Co.*, 40 Minn. 213, and again, directly, in the action in which the present assessment was laid, reported as *Merchants National Bank v. Minn. Thresher Mfg. Co.*, 90 Minn. 144.

This is in conformity with the long line of decisions of the Minnesota courts and upon a principle laid down in the earlier decisions and consistently followed down to the present time.

Thus it was said in *First Nat. Bank v. Winona Plow Co.*, 58 Minn., 167 : " We are of the opinion that by its articles of incorporation this defendant is both a manufacturing and a mercantile corporation. Such articles of incorporation provide for the 'purchase' and 'sale of plows, cultivators and other farming and agricultural implements of all kinds,' as well as for the 'manufacture,' 'repair' and 'sale' of those articles. * * * The fact that the stockholders, as found by

the court, did not intend to carry on anything but an exclusively manufacturing business, and that the corporation never did carry on any other business except such commission business, can make no difference. 'And if the corporation is organized for the purpose as declared in the articles of association of carrying on both a manufacturing business, and also some other kind of business not properly incidental to or necessarily connected with a manufacturing business, the mere fact that the corporation never exercised all its powers, and never in fact engaged in or carried on anything but a manufacturing business, will not bring it within the constitutional exception.' *Arthur v. Willius*, 44 Minn., 415" (1894).

In *Anderson v. Anderson Iron Co.*, 65 Minn., 281, it was held, that as the articles of association provided for "buying, selling, leasing and dealing in mineral lands" the corporation was not exclusively a mechanical one. "It is true that the articles of incorporation here in question are no broader than is authorized by G. S., 1894, sec. 2827, and at section 2829 declares that a corporation so organized 'shall be deemed to exist * * as a manufacturing and mechanical corporation under the constitution and laws of this state.' But the very purpose of the constitutional amendment was to prevent the legislature from exempting the stockholders of such corporations as this from liability; and so far as section 2829 controvenes the constitution, we must hold it void."

Upon precisely the same principle; that is, that the character of the corporation is determined solely by its articles of association, it was held in *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn., 413, that where the articles provided solely for carrying on a manufacturing business, the fact that the corporation had done some business outside of that which was authorized, did not render the stockholders personally liable. "The liability of stockholders cannot rest on any such uncertain or transitory basis." Where the power to do such independent business was given by the articles, "in going beyond the manufacturing business, the corpora-

tion still kept within the limits of its charter, but in so doing the stockholders became liable, not because they had violated the law, but because their articles authorized the corporation to carry on a business other than that of manufacturing, though in strict compliance with that authorized by the articles themselves. The distinction is obvious" (1898).

In *Senour Mfg. Co. v. Church Paint & Mfg. Co.*, 81 Minn. 294, the appellant maintained that proof of intention on the part of some of the incorporators to engage in outside business, but to limit the purpose declared in the articles of incorporation to manufacturing solely would render the stockholders individally liable. This the court answered by saying, "In such cases the corporation would be a manufacturing corporation as to some of the stockholders, and a mercantile corporation as to others, and the courts would be annoyed and perplexed in unravelling controversies as to the exact status of the stockholders. We cannot open the door to such confusion, as we hold, without further discussion that, in proceedings to enforce the individual liability of stockholders of a corporation, the articles of incorporation are the sole criterion as to the purposes for which the corporation was formed."

The authorities were fully considered by the Supreme Court of Minnesota on appeal from the decree levying the present assessment (68–72) and the doctrine above stated that the articles of association are the sole criterion was reaffirmed.

The interpretation of the constitution of a state by the highest court of the state is regarded as binding upon this court when no federal question is involved. This rule, which is too firmly established to admit of discussion, was recognized in the very recent case of *Middletown Bank v. Railway Co.* 197 U. S. 391, 404, where it is said: "We have not been referred to any decision of the Ohio Supreme Court directly involving the question whether the provision of the constitution referred to is self-executing or not. If there were any such decision *we should follow it.*"

In *Morley v. Lake Shore R'y Co.*, 146 U. S., 162, 166, the first question which arose was that of the proper construction of a statute of New York. This the court answered by saying: "This question is answered for us by the decision of the Court of Appeals of New York in this very case." * * * In *Louisiana v. Pillsbury*, 105 U. S., 278, 294, this court, speaking by Mr. Justice FIELD, says: 'Whether such a construction [by judicial decisions upon a clause of the *state constitution*] was a sound one is not an open question.' * * * 'The rule of construction adopted by the highest court of the state, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.' *Provident Institution v. Massachusetts*, 6 Wall., 611, 630, 'The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as is the text.' *Leffingwell v. Warren*, 2 Black, 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. *Randall v. Brigham*, 7 Wall., 523, 541."

In *Forsyth v. Hammond*, 166 U. S., 506, 518, Mr. Justice BREWER, writing the opinion of the court, said: "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the supreme court of a state has misconstrued its constitution or statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

And in *Sioux City R. R. Co. v. N. A. Trust Co.*, 173 U. S., 99, 107, it was said by Mr. Justice WHITE: "It is an elementary principle that this court in interpreting a state statute will construe and apply it as settled by the court of last resort of the state, and will hence only form an independent judgment, as to the meaning of the state law, when there was no binding

construction of such state statute by the court of last resort of the state."

And the settled construction of the Minnesota constitution as applicable to the present case appears to be fully recognized in *First Natl. Bank v. Converse*, 200 U. S. 425, 438.

The constitution of Minnesota in establishing this liability must have contemplated, (1) that all stockholders should be placed on the same basis of liability; (2) that in many cases such stockholders would be divided into two classes, those resident in Minnesota, and those resident in other states; and (3) that the legislature would see to it that adequate remedies were provided to reach both classes of stockholders. And every person who became a stockholder in either class must have contemplated subjecting himself to whatever liability attended the act of becoming a stockholder.

In this situation, there were two courses which the legislature might adopt. The one was, to devise a remedy through which the constitutional liability of stockholders might be effectively enforced; the other, to leave the courts of the state to work out suitable and appropriate remedies, through existing and appropriate methods of procedure.

The legislature of Minnesota adopted the first course, and endeavored to provide an adequate remedy in certain statutes which it passed, which was subsequently incorporated in Chapter 76 of the General Statutes of Minnesota, of 1894, in Sections 5897 to 5911 of the same.

The remedy which the legislature thus attempted to provide did not prove to be efficacious. And, upon the well-settled rule that where a particular remedy is provided, it is exclusive, if the remedy was not efficacious, or to the extent to which it proved not to be efficacious, the creditors were remediless, and the protection which the constitution gave to them was brought to nought.

In *Allen v. Walsh*, 25 Minn. 543, it was held that the only remedy to enforce this liability of stock-

holders was provided in this Chapter 76, and that the statute contemplated a *single action*, in which all persons having or claiming any interest in the subject of the action should be joined or particularly represented, and their respective rights, equities and liabilities finally settled and determined ; and, further, that the receiver of an insolvent corporation was not, under the terms of that chapter as it *then* stood, a proper party to bring such action.

As the receiver, then, could not bring such action, manifestly the only parties to bring it were the creditors, or some one or more of them, on behalf of all, or bringing in the remaining creditors as parties defendant. And while it is not impossible that in an action so brought a final equitable adjustment of the affairs of an insolvent corporation might have been reached, and even that a way might have been found to reach and enforce the liabilities of non-resident stockholders, it suffices for present purposes to point out that the remedy evidently proved unsatisfactory in its practical working, as was shown by repeated attempts to enforce those liabilities through the instrumentality of a receiver.

And in this connection it may be observed that if the creditors' rights could be fully enforced under the provisions of this Chapter 76, then the legislation which followed in the Act of 1899 was a mere simplification of the existing remedy ; but if they could not so be enforced, then further legislation was necessary to fulfill the purpose of the constitution, and to give effect to the rights which it secured.

Here it is desirable to consider certain decisions as to the effect of the provisions of the Minnesota statutes, before the Act of 1899, and after it was passed.

William E. Hale was appointed Receiver of the Northwestern Guaranty Loan Company, a Minnesota corporation, in February, 1897, in a suit in equity which had been brought by a creditor in behalf of

himself and all other creditors for the purpose of enforcing the individual liability of stockholders.

In reliance upon the provisions, above referred to, of Chapter 76 of the Minnesota General Statutes of 1894, Hale, as such Receiver, brought an action at law in the Circuit Court of the United States for the District of Massachusetts against a stockholder for the enforcement of his liability.

This is reported, in the first instance, as *Hale v. Hardon*, 89 Fed. 283, which gives the decision of Judge PUTNAM upon the trial of the action before him, in September, 1898. He awarded judgment to the defendant, holding—"First, that the proceeding in which this plaintiff was appointed a so-called receiver is void, so far as this defendant is concerned; and, second, that the plaintiff is not of the class entitled to maintain a suit at law in a jurisdiction foreign to that which vested him with his office."

Upon a writ of error the Circuit Court of Appeals—*Hale v. Hardon*, 95 Fed. 747,—reversed the judgment and ordered a new trial. This left the decision of the Circuit Court of Appeals for the First Circuit in favor of the right of Hale, as such Receiver, to maintain his action at law in other states, under the then existing state of the statute law of Minnesota, viz., Chapter 76 of the General Statutes of 1894.

The same Receiver, Hale, brought a similar action at law, against another stockholder, in the Circuit Court of the United States for the Northern District of New York. This was tried before Judge COXE without a jury, and is reported as *Hale v. Hilliker*, 109 Fed. 273. In obedience to the decision of the Circuit Court of Appeals for the First Circuit in *Hale v. Hardon*, in 95 Fed. 747, the right of action was maintained, and judgment was awarded to the plaintiff.

Upon writ of error to the Circuit Court of Appeals for the Second Circuit, that court, in *Hilliker v. Hale*, 117 Fed. 220, reversed the judgment below, holding that a receiver appointed by the court merely under its general equity powers, was not vested with the title

to a cause of action to enforce the stockholders' liability which would support an action by him against the stockholder in a jurisdiction other than that of his appointment.

This left the Circuit Courts of Appeals of the First and Second Circuits in direct opposition to one another upon the question of the right of the Receiver, Hale, to maintain actions against stockholders in any jurisdiction outside of the State of Minnesota.

The same Receiver, Hale, brought still another action, against another stockholder. This was a suit in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania,—*Hale v. Allinson*, 102 Fed. 790. Issue was taken by demurrer, on the ground that the complainant's remedy was at law, and the court sustained the demurrer on that ground, citing *Hale v. Hardon*, in 95 Fed. 747.

On appeal to the Circuit Court of Appeals for the Third Circuit, this decision was affirmed,—*Hale v. Allinson*, 106 Fed. 258, the court expressing itself as strongly of the opinion that the Receiver could maintain no action outside of Minnesota, but confining its decision to the proposition that the complainant's only remedy was by action at law.

Before following the history of these litigations further, it is important to take notice of some other matters, which will be seen to have a material bearing upon their final result and effect.

Leonard Howarth was appointed Receiver of the Traders Bank of Tacoma, a corporation of the State of Washington, by a court of that state, in proceedings instituted in the year 1894 for winding up the affairs of the corporation.

The constitution of Washington, Art. 12, § 11, provided: "Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable, equally and ratably, and not one for another for all contracts, debts and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount

of their stock therein at the par value thereof, in addition to the amount invested in such shares." The statutes of the State of Washington repeat the declaration of individual liberty in almost the identical words of the constitution.

It is to be noted, in passing, that there is a radical difference in the declaration of the constitution of Minnesota and that of Washington in one respect. The liability of the Minnesota stockholder is coextensive with the obligations of the corporation, and limited only by the par value of the stock "held or owned by him" so that the solvent stockholders may be held liable up to the par value of their stock for all obligations of their corporation; while the liability of the Washington stockholders is, like that of stockholders in national banks, limited to the proportion which the par value of his stock bears to the total capital stock "for all contracts, debts and engagements of such corporation." But, subject to these different limits as to its *extent*, the nature and character of the liability is the same in both cases.

The legislature of Washington, unlike that of Minnesota, did not attempt to provide a remedy to enforce the constitutional liability, but left the courts of that state to work out appropriate remedies as occasion might arise. And this the courts of that state proceeded to do. They held in *Cole v. Satsop R. R. Co.*, 9 Wash., 487, and in *Hardin v. Sweeney*, 14 Wash., 129, that a receiver appointed to wind up the affairs of an insolvent corporation became a receiver for all the creditors, and a *quasi* assignee, and that the individual liability of stockholders was a trust fund for the payment of creditors, vested in the receiver.

In the proceedings in the Washington court in which Howarth was thus appointed receiver an assessment was laid upon the stockholders and the receiver was directed to collect it. He brought actions for the recovery of the amount of such assessments in the state courts of New York and Massachusetts, and in both his right to maintain his action and to recover was upheld.

In *Howarth v. Angle*, 162 N. Y., 179, 187, the court, in sustaining his judgment, said: "The defendant took stock in the Tacoma bank subject to the burden of the law, which he impliedly agreed to bear, as he could not otherwise have become a stockholder. That burden is *an asset*, vested in the receiver, and can be enforced in this state the same as a promissory note, not because the laws of Washington are in force here, but because the defendant voluntarily assented to the conditions upon which the bank was organized. * * * While the liability is, for convenience, frequently called statutory, because the statute, which is the constitution of the bank, affixed the obligation to the ownership of stock, it is in fact contractual and springs from an implied promise. There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take the stock and pay for it, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stock may be owned. The fact that the former is the promise of a principal and the latter of a surety, does not affect the question. The express promise runs to the corporation, while the implied promise runs to the creditors, and may, according to the common law of the state where it was made, be enforced for the benefit of creditors by a receiver of the corporation appointed to wind up its affairs. The latter promise is not a part of the capital stock of the bank, but is a *substitute*, required by statute, for the personal liability of a partner at common law, and has the same object, which is the protection of creditors."

In *Howarth v. Lombard*, 175 Mass., 570, 574, 579, the court, affirming the judgment there in favor of the same receiver, said: "It is to be noticed under this statute that stockholders, merely by subscribing for stock, without an express promise to pay for it, are bound in all corporations to pay the amount of their unpaid subscriptions, if needed, and in banking corporations

to pay *as much more*, if it is called for to satisfy creditors. * * * Although the liability is founded on a statute, there is a contractual element entering into it. The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the *additional* sum to create a fund for creditors if the corporation should become insolvent and a receiver should be appointed to collect it." And, again: "The remaining question is whether an action upon the liability so determined can be maintained by the receiver in his own name. It has been held that an ordinary appointment as a receiver, made in another state, will not enable the appointee to sue in this Commonwealth in his own name. If he has a right of property as assignee, he may maintain an action. * * * In the present case the receiver is called by the court in Washington a *quasi* assignee for creditors. He is charged with the administration of a trust fund which does not take form or come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors he is the owner of the legal title to this fund as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money. We are of opinion that the action is rightly brought in his name."

Now it had been held in *Allen v. Walsh*, 25 Minn. 543, that the remedy provided by chapter 76 of General Statutes of 1894 was exclusive. It had been held in *Minneapolis Base Ball Co. v. Bank*, 66 Minn. 441, 446: "If it be desirable, in order to secure a speedy, economical, and practicable method of enforcing the liability, to invest the receiver with such power [to sue], it must be done by statute. This

has already been done in cases where the receiver of an insolvent banking corporation is appointed on the application of the superintendent of banks. Such a receiver is expressly authorized to enforce the individual liability of stockholders." It had been held upon the trial of *Hale v. Hardon* that the receiver provided for could not sue in Massachusetts. The same question was raised in other suits, as in *Finney v. Guy*, 106 Wisc. 256, and in *Hale v. Allinson (supra)*, and if not already decided adversely to the right of such receiver, it was recognized as a serious one. If the receiver was not entitled to sue stockholders in other states, then the difficulty was, clearly, that the remedy afforded by chapter 76 was not only exclusive, but also ineffectual; it was actually an obstacle to the liability of the stockholders. As was said by the court in *Hanson v. Davison*, 73 Minn. 454, "If chapter 76 were *repealed*, equity would find an *adequate* remedy for the enforcement of the liability."

Such was the situation when the legislature of Minnesota felt itself called upon to act. It might have adopted the suggestion in *Hanson v. Davison (supra)* by repealing chapter 76, thus leaving the courts to work out a remedy, as had been done in Washington. But it evidently deemed it wiser and safer to work out the remedy for itself, and to give to the remedy the sanction of positive law, leaving to the courts only the duty of following and applying it. Accordingly the Minnesota legislature enacted the Act of 1899, the material portions of which, so far as they affect the present questions, are set forth in the complaint herein (9-11). And, in so doing, the Minnesota legislature adopted, in all substantial respects, the identical remedy which had been worked out by the courts of Washington, the efficacy of which had been approved in *Howarth v. Angle* and *Howarth v. Lombard (supra)*.

I. The efficacy of this remedy for the enforcement of the liability of stockholders in other states has been judically recognized.

It was after the passage of this Act of 1899 that Horace R. Robinson, who had been appointed Receiver of another Minnesota corporation, brought his action against a stockholder for the enforcement of the liability of the defendant as such stockholder, in the Circuit Court of the United States for the District of Massachusetts, and recovered judgment. The defendant took a writ of error to the Circuit Court of Appeals for the First Circuit.

The decision of the latter court is reported as *Burget v. Robinson*, 113 Fed. 669, and was an affirmance of the judgment in favor of the Receiver, the court saying that the plaintiff below stood as the representative of the creditors of the corporation.

This discussion of these cases may seem tedious, but the outcome is illuminating, if not indeed an absolute demonstration of the right of Converse, the Receiver herein, to maintain the present actions in New York, as will now be shown.

Hale, the Receiver of the Northwestern Guaranty Loan Company, who had been defeated in his action against a Pennsylvania stockholder by the decision of the Circuit Court, affirmed in the Circuit Court of Appeals, *Hale v. Allinson*, 106 Fed. 258, petitioned this court for a writ of *certiorari*, and the petition was granted on May 13, 1901 (181 U. S. 619).

The cause was fully heard in this court, and the decision is reported as *Hale v. Allinson*, 188 U. S. 56. The decision, affirming that of the Circuit Court of Appeals, and hence denying the right of the Receiver to maintain his action in Pennsylvania, after noting the fact that the Minnesota Supreme Court had held that a receiver could not maintain such an action in the courts of that state, which of itself ought "to compel an affirmance of the judgment," goes on to say (pp. 66–67): "The suit now before us was commenced in November, *1898*. * * * It seems entirely clear that the receiver provided for in section 5906 of the above quoted statute, while not the receiver mentioned in section 5897, is yet simply one to be appointed in aid of the court to work out the provi-

sions of the section, if the court choose to appoint him, and by section 5907, the court, if it appear that the corporation is insolvent, may proceed, *without appointing any receiver* to ascertain and enforce the liabilities of stockholders in the creditors' action. The receiver, if he be appointed, is *not given power* to represent the creditors or to maintain, as representative owner or trustee, an action, inside or outside the state, to enforce the liability spoken of." "We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that state do not provide for the appointment of a receiver to recover as such the amount of the added liability of the non-resident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. * * * We are thus brought to the fact that this is a plain and simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the courts without any other right or title."

Thus the denial of the right of the receiver in *Hale v. Allinson* to enforce the individual liability of stockholders is placed upon the failure of the then existing statutes of Minnesota to vest the receiver with any title or any power "to maintain, as representative owner or trustee, an action, inside or outside the state, to enforce the liability."

These very elements, thus found wanting in the former statutes, these very statutory powers and title, the absence of which had compelled the denial of the right of the receiver in *Hale v. Allinson*, were supplied in the Act of 1899, clearly, fully and distinctly.

Burget, the stockholder who had been held liable, *Burget v. Robinson (supra)*, in the action brought by the Receiver, Robinson, who was appointed by the

Minnesota court *after* the passage of the Act of 1899, also petitioned this court on October 20, 1902, for a writ of *certiorari* to review the judgment against him; and his petition was denied on January 19, 1903 (188 U. S. 739), *the very day* on which the decision of this court in *Hale v. Allinson* (188 U. S., 56) was rendered.

Thus this court denied the right of the receiver in the one case, and *simultaneously* refused to deny it in the other. The only conclusion to be drawn is that this court found that there was a radical distinction to be drawn between the two cases. And this distinction is readily seen in the fact the Act of 1899 had vested the receiver in the *Burget* case with the title and right of action in other states, which was found wanting in the receiver in the *Hale* case.

But this is not all. After Burget's petition for a *certiorari* had thus been denied, he applied to the Circuit Court of Appeals for a rehearing there. This was denied.

This latter decision is reported as *Burget v. Robinson*, 123 Fed., 262. In the opinion then delivered it is said (pp. 267-268): "*Hale v. Hardon*, like *Hale v. Allinson*, was based entirely on Gen. Stat. Minn., 1894, c. 76, as pointed out by the opinion of the Supreme Court in the latter case. But the present plaintiff relies both upon that statute and on the alleged authority and rights given him by Chapter 272, p. 315, of the General Laws of Minnesota for the year 1899, the details of which it is not necessary to recite, except to state that the plaintiff claims that the Act of 1899 vested in him a certain title and interest in addition to any rights which could arise under General Statutes of 1894." Then, after quoting from the language of this court in *Hale v. Allinson*, the opinion goes on: "Referring to the expression, 'the statute did not confer upon the receiver the right to proceed to enforce the liability of stockholders,' the statute of 1899 is, perhaps, susceptible of a different construction; indeed, of such a construction as to bring this case within *Relfe v. Rundle*, 103 U. S., 222, which the Supreme Court also refers to." And then, after considering the principles fol-

lowed by this court in its disposition of petitions for writs of *certiorari*, the opinion concludes as follows: "It is, therefore, unsuitable to presume that the Supreme Court entertained a petition for a writ in *Hale v. Allinson*, and entered judgment therein against the receiver, but refused the writ in the present case, and yet had any impression that the two involved the same question, and thus practically introduced the very 'diversity of judgments' which it says it was the purpose of the statute to avert."

The foregoing opinion was delivered on May 1, 1903. It appears by papers in the office of the clerk of this court that on May 15, 1903, Burget presented to this court a further petition, praying for a rehearing of his application for a *certiorari*, specifying sixteen grounds, among which are—that the decision in his case was at variance with that in *Hale v. Allinson*, and that the Receiver, Robinson, had no title to support an action by him outside of Minnesota. And in the same manner it appears that the prayer of this further petition was denied on June 1, 1903.

Under these circumstances it seems impossible to regard the action of this court in entertaining the *Hale* case, and giving it full consideration, and in declining to entertain the *Burget* case which was before it at the same time, and in rendering its decision in the one and denying a hearing in the other upon the same day, and in adhering to the denial in the *Burget* case after its attention was fully called to the assumed identity of the questions presented by each, as leading to any other proper or legitimate conclusion, consistent with the character and dignity of this court, than that its action was, and was intended to be, in legal effect, tantamount to an affirmance of the judgment against Burget.

If anything more were wanted to give added weight to this conclusion, it might be found in the circumstance that,—intermediate between the denial of Burget's petition on January 19, 1903, and the presentation for a rehearing thereon, on May 1, 1903, —there was argued in this court on February 27 and

March 2, 1903, and decided on April 6, 1903, on writ of error to the Supreme Court of Wisconsin, the case of *Finney v. Guy*, 189 U. S., 335, which presented the question of the right of the receiver of an insolvent Minnesota corporation, appointed prior to the Act of 1899, to maintain an action in Wisconsin to enforce the liability of a stockholder,—that is, the identical question which Burget claimed was presented in his own case,—and, in a carefully considered opinion, the doctrine of *Hale v. Allison* was reaffirmed.

II. The efficacy of the statute to vest the title to the stockholders' liabilities in the receiver, is clear from the terms of the statute itself.

These terms are fully set forth in the complaint and record herein (9-11, 42-46). The act in chapter 272 of the Laws of Minnesota for 1899.

Section 1 directly authorizes the procedure which is provided in the subsequent sections whenever a receiver has been appointed by a District Court of the state for a Minnesota corporation "whose stockholders or any of them, are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said s ate, or otherwise."

Section 2 provides that on the petition of such receiver the District Court shall appoint a time for hearing, "and shall direct such notice of such hearing to be given by the party presenting such petition, by publication or otherwise, as the court in its discretion may deem proper."

Section 3 provides that at such hearing the court shall consider such proofs as shall be offered by the receiver, or by any creditor, officer or stockholder of the corporation, "as to the probable indebtedness of said corporation, and the expenses of said * * * receivership and the probable amount of assets avail-

able for the payment of such indebtedness and expenses, and also as to what parties are or may be liable as stockholders of said corporation, and the nature and extent of such liability." If it appears to the satisfaction of the court that the ordinary assets will be insufficient to meet these payments and that it is necessary to resort to the individual liabilities of the stockholders the court shall thereupon, by order direct and levy a ratable assessment upon all parties liable as stockholders, for such percentage of their liability upon each share of stock as the court in its discretion may deem proper, "taking into account the probable solvency or insolvency of the stockholders, and the probable expenses of collecting the assessment," and shall direct the amount so assessed to the receiver, within a time specified.

Section 4 provides that this order shall direct the amount so assessed upon each share of stock from the parties liable, and shall authorize the receiver to prosecute actions, against all failing to pay within the time specified, "wherever such party may be found, whether in this state or elsewhere."

Section 5 makes such order and assessment conclusive upon all parties liable "as to all matters relating to the amount of, and the propriety of, and necessity for the said assessment."

Section 6 makes it the duty of the receiver, upon the expiration of the time specified, to institute actions against all parties liable, who have failed to pay the amount of their assessments, for the recovery of the same, and adds: "Such actions may be maintained against each stockholder, severally, in this state or any other state or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder may be found."

By section 11 it is further provided that if the amounts realized shall exceed the amount required for the purposes of the assessment, the surplus shall be divided among the stockholders from whom the assess-

ments shall have been collected, *pro rata*, according to the amount of their respective contributions.

The legislative grant of authority to the receiver to maintain these actions for the recovery of the amounts of the several assessments must necessarily be held to vest in him all title needful to the bringing and maintenance of such actions. The whole scheme of the statute is to treat the individual liabilities as assets to be realized by the receiver, as a trustee for the creditors, which he is made in fact, if not in name.

No statute can impose upon an official representative, created under its provisions, an obligation, a positive duty to bring an action, without *ipso facto* conferring upon him whatever title may be required to support it. As was said in *Stief v. Hart*, 1 N. Y. 30, "Whenever a power is given by statute, everything necessary to making it effectual, or requisite to attain the end, is implied."

The situation is substantially the same as that created by the terms of the National Banking Act. The receiver therein contemplated is not expressly declared to be vested with the individual liability of the stockholders. But the Act says that the receiver "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." It was said in *Kennedy v. Gibson*, 8 Wall. 506: "The receiver is the *statutory assignee* of the association, and is the proper party to institute all suits. * * * He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit." There is nothing in the Act, beyond the provision above quoted, to support this holding that the receiver is the statutory assignee of the corporation, except its manifest spirit and purpose. The individual liabilities are not expressly declared to be assets, but the uniform construction of the Act treats them as such, because that is the necessary effect of the direction to the receiver to enforce them.

To the same effect is *Richmond v. Irons*, 121 U. S., 27, 50. "It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least so closely connected with it as to constitute but one continuous transaction. * * * Admitting that this liability is not strictly an asset of the bank because it could not be enforced for its benefit as a corporation, nor in its name, yet it is treated as a means of creating a fund, to be applied with and in aid of the assets of the bank toward the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however *otherwise* distinct, are, by the statute, made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank."

Every word of this might have been written, with equal force, and like application, if the court had been considering the liability of a stockholder in a Minnesota corporation, under the constitution of Minnesota, and the scheme adopted by the Legislature of Minnesota for the enforcement of that liability.

III. To sum up then the argument upon this Point First.

The Constitution of Minnesota imposed upon stockholders of the Minnesota Thresher Company a general and several liability for all legal obligations of the corporation to an amount equal to the par value of the stock respectively owned or held by them.

The legislature of Minnesota, after first devising a remedy which was not efficacious, passed the Act of 1899 which was manifestly intended to supply a remedy which should be efficacious.

The Act of 1899, in legal effect, vested the title to these individual liabilities in the receiver, as a trustee for creditors, and directly authorized the receiver to maintain actions for their collection wherever the stockholder should be found.

The receiver thereby became a "statutory assignee"

within the principle declared by this Court in *Kennedy v. Gibson (supra)*, and in conformity with the rule followed in *Relfe v. Rundle* (*supra*), and with the decisions of the Supreme Court of Massachusetts and the Court of Appeals of New York in the *Howarth* cases *(supra)* which held the receiver appointed by the courts of Washington under like conditions to be a "*quasi* assignee."

The right of a Minnesota receiver appointed and proceeding under the Act of 1899 is recognized and, in legal effect, approved by this Court in the *Burget* case *(supra)* when it reversed the judgment in *Hale v. Allinson (supra)* where the receiver had been appointed before the Act of 1899 was passed and refused to entertain the *Burget* case, although its attention was explicitly drawn to the claim that the two cases presented the identical question. And this, also, although this court had *in the meanwhile* held in *Finney v. Guy (supra)* that a Minnesota receiver appointed before the Act of 1899 could not maintain such action.

It would seem, then, in the light of reason and of authority, that the right of the present Receiver, CONVERSE, to maintain these present actions in the federal court in New York, is not open to question.

POINT SECOND. The obligations and liabilities of the stockholders of the Minnesota Thresher Manufacturing Company rest upon a contract by which they have submitted themselves to the jurisdiction and control of the State of Minnesota.

In a long series of decisions, beginning with *Bank of the United States v. Deveaux*, 5 Cranch 61, this court, in upholding the federal jurisdiction on the ground of diversity of citizenship in cases where corporations were parties, has established the rule that while for some purposes a corporation may be regarded as "an

invisible, intangible thing, a mere incorporeal legal entity," yet in considering the question of jurisdiction the courts could look beyond the corporate name and notice the character of the individual members. "The term citizen ought to be understood as it is used in the Constitution, and as it is used in other laws. That is, to describe *the real persons who come into court*, in this case under their corporate name."

In *Marshall v. Baltimore & Ohio RR.* 16 How. 314, 328, it is said: The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the 'defendants are a body corporate by the act of the General Assembly of Maryland,' is a sufficient averment that *the real defendants* are citizens of that state."

And, again, in *Muller v. Dows*, 94 U. S. 444, 445, it is said: "A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought *by or against the stockholders* of the corporation; and for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the corporation."

This doctrine is not set forth as a legal fiction. This court had no power, nor has it ever assumed to exercise the power, to resort to the expedient of a legal fiction in order to evade or overcome the plain requirements of the Constitution. In thus declaring, *firstly*, that the corporation is substantially identical with its members, and that a suit by or against a corporation is to be regarded as a suit by or against all the stockholders of the corporation, it has declared that such is the sound and true legal construction of the situation presented. And in declaring, *secondly*, that for purposes of jurisdiction the stockholders must be conclusively presumed to be "citizens of the state which, by its laws, created the corporation" it has declared a rule of law which, if true at all, must be a rule of general application, and not limited to cases

which present the question of federal jurisdiction based upon diversity of citizenship.

I. The first of these propositions, that the corporation is identical with its members, is but the application of a general principle upon which rests the rule that judgments touching corporate matters and interests, which have been rendered in suits or actions to which the corporation is a party, are conclusive upon its stockholders, and are an estoppel upon them equally with judgments in suits and actions to which the stockholders are individually parties.

This identity of the stockholders with their corporation is too often lost sight of, or ignored, in the legal refinements in regard to the corporation as an abstract entity, vested with rights which are asserted and defended in the corporate name. And these legal refinements are apt to conduce to a general impression that the stockholders are something distinct from the corporation, standing apart, and having only an interest, for profit or loss, contingent upon the success or failure of the adventures which the corporation, as an abstract entity, may undertake and prosecute.

But in all corporate enterprises the stockholders are themselves the adventurers. Whatever is done, is done in their sole interest. The corporate entity is the sum total of themselves, individually. No one else has any interest in the corporate business or in its results. They elect the directors, and, either directly or through the directors, they select all the executive officers. The directors and officers thus constituted are their agents. Whatever the directors and officers do, they do as their agents and on their behalf. For the results of the action of the directors and officers they are responsible to the fullest extent, excepting only in so far as that responsibility is limited by provisions of positive law. And for this reason the courts are swift to enforce the right of the stockholders to call upon these agents for an

account of their stewardship, and that in the very strictest way.

II. The second of these propositions, that the stockholders must be conclusively presumed to the citizens of the state of the corporation, is the application of another general principle, which, upon consideration, will be found to be equally well established with the first; and, in a certain measure, to be a corollary to the first.

1. As jurisdiction over the corporation, in respect of corporate matters and interests, which are the matters and interests of the stockholders, is, in effect, jurisdiction over the stockholders themselves, it should follow that when and where such jurisdiction exists over the corporation it likewise exists, in respect of the *same* matters, over the stockholders individually, through a suit or action by or against them. General jurisdiction over the corporation necessarily exists in the state by which the corporation is incorporated, and it would seem that in respect of corporate matters and interests it should likewise exist there over the stockholders.

When an action which has been brought against a corporation in a state court is removed into a federal court on the ground of diversity of citizinship, the rule that the stockholders are conclusively presumed to be citizens of the state from which the corporation derives its existence is not *created* and *cannot be created* by the act of removal or by the statute of the United States under which the removal is had; but it is, and must be, a rule *already existing*, independently of the statute, and already in full force and operation. For it would clearly not be competent for any act of Congress or any decisions of the federal courts to effect a change in the existing relations between a corporation and its stockholders where those relations have been constituted and established through the incorporation under and by virtue of the laws of the state.

This conclusive presumption must then originate in and flow from the act of incorporation. It must be a legitimate and necessary consequence of the action of the stockholders, individually, in accepting the benefit of incorporations, in becoming members of the corporate body, in becoming collectively the corporate body itself, and in making themselves, *quoad* the corporation and its interests and their interests in it, citizens of the state of the corporation; and this to such supreme degree that they are estopped from asserting, and the courts are justified in ignoring, their actual citizenship, if it does not in fact conform to this presumption.

2. The charter is a contract to which the stockholders are the contracting parties on the one side, and the state which grants the charter is the other contracting party.

It is evident that the identity of the stockholder with his corporation,—the identity which estops him to deny the conclusiveness of a judgment rendered in a suit to which his corporation has been a party, and estops him to assert in corporate matters a citizenship other than in the state of his corporation,—must arise in some way from a compact valuntarily entered into by the stockholder. No such position could be imposed upon him without his consent.

And it is equally evident that this compact is one which is entered into by the stockholder with the state. The state offers certain benefits and privileges to those who desire to become a corporation under its laws, upon the condition that they will submit themselves to the obligations and liabilities which it imposes upon those who choose to avail themselves of those benefits and privileges. The acceptance of the one is the acceptance of the other. Such acceptance is purely voluntary; but when it is given all the elements of a contract are supplied, and a contract is made by which both of the parties are equally bound.

It has been sometimes said that in becoming an incorporator, or in the subsequent acquisition of stock, the stockholder enters into a contract with his corpo-

ration. But this is no more literally true than it would be to say that one who becomes a party to articles of copartnership is thereby entering into a contract with his firm. A partner may enter into a separate and individual contract with his firm, and a stockholder may enter into a separate and individual contract with his corporation; but in neither case is this done by merely becoming a member of a firm or a stockholder in the corporation; in either case the partners or the stockholders enter into the relations, *inter sese*, of joint adventurers, and assume certain obligations to one another, which will be enforced in equity as between themselves; and in each case these obligations to one another arise from the fact that they have united themselves together for the prosecution of a common adventure, for their common interest and benefit.

In the articles of incorporation by which a corporation is usually formed, no word is found of any contract on the part of incorporators or stockholders with the corporation itself. It is an undertaking that the parties will unite in taking upon themselves, collectively, the character of stockholders, and becoming, collectively, a corporation.

Take, for instance, the articles of incorporation by which this very Minnesota Thresher Manufacturing Company was formed (34–36). This instrument states that "We, the undersigned, * * * do by these presents, pursuant to and in conformity with an act of the Legislature of the State of Minnesota, * * * associate ourselves together and hereby form a body politic and corporate." It then goes on to state: First, the corporate name adopted; Second, the objects for which the corporation is formed; Third, the amount and classification of the capital stock; Fourth, the period of duration of the corporation; Fifth, the principal place of business. And it concludes, "We hereby adopt the foregoing articles of association of the Minnesota Thresher Manufacturing Company for the purpose of becoming a body politic and corporate under said name."

This is a distinct and formal acceptance of the offer

of incorporation extended by the state, upon the terms of that offer. It is an acceptance, by the individuals who are thus forming themselves into a corporation of the state, of the terms and conditions upon which that offer is extended, of submission to the laws and jurisdiction of the state in all matters touching corporate interests and their personal relations with it in their character of stockholders. It is a direct contract with the state on their part, and on the part of every person who voluntarily accepts the benefit of the incorporation by becoming a stockholder.

In *Dartmouth College v. Woodward*, 4 Wheat. 518, 656, 657, it was held that the charter of a corporation was a contract on the part of the state which granted it, and that the state could not vary the terms of the charter, to the disadvantage of the corporation and of the interests represented by, and confided to, and conferred upon it, without impairing the obligation of the contract. As there must be two parties to every contract, it is obvious that the contract which the state is not permitted to impair it is equally entitled to enforce. And in this very decision a contract is defined as "A transaction between two or more persons, in which *each* party comes under an obligation to the other and each reciprocally acquires a right to what is promised by the other." It is added: "A corporation is defined by Mr. Justice BLACKSTONE to be a franchise." "To this grant, or this franchise, the parties are, the King and *the persons* for whose benefit it is created, or trustees for them."

In *Farrington v. Tennessee*, 95 U. S., 679, 684, Judge SWAYNE quoted with approval *The King v. Passmore*, 3 T. R. 199, where "Judge BULLER said he 'considered the grant of incorporation to be a contract between the Crown and *a certain number* of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves to carry out the objects of the grant."

III. When, then, the stockholders of the Minnesota Thresher Manufacturing Company accepted the grant

of incorporation from the State of Minnesota, they contracted to subject themselves to the jurisdiction of that state in all matters touching the rights and obligations of the corporation, which drew its existence solely from that grant, and in all matters touching their individual rights and obligations as members of that corporation. In respect of all such matters they contracted that, whatever might be their actual residence, they should be conclusively presumed to be citizens of Minnesota. To this extent they agreed to be subject to its laws, and to the process and orders and decrees of its courts, and waived any right to question their jurisdiction or the validity of their proceedings, other than by the ordinary modes of appeal and review.

POINT THIRD. The legislation of the State of Minnesota in providing an adequate and effectual remedy for enforcing the obligations and liabilities of stockholders does not impair any obligation of their contracts.

This discussion relates to the obligation of the contract of the stockholders to be personally responsible, within the limits fixed by the terms of incorporation, for the liabilities of the corporation of which they have become members.

I. The obligation of a contract is the burden assumed by a party entering into a contract of performing some act or making some payment, conditionally or unconditionally.

Sometimes both parties to a contract assume such duties, each to the other or for the benefit of the other. In such case each party is entitled to performance, and any legislation which assumes to deprive

either party of the benefit which is assured to him by the terms of the contract, impairs its obligation as to him.

But where the contract is unilateral, as where, for a consideration, one party agrees to pay money to the other, or for the benefit of the other, or to a person designated by the other, then the sole obligation of the contract is upon the party who undertakes to make such payment. In such cases, and the reports are full of them, the question has always been whether the legislation complained of has impaired the obligation of the contract to the creditor or promisee, by depriving him of a right existing when the contract was made, either by its terms or by the laws which then afforded adequate remedies for its enforcement.

And in such cases the decisions of the courts have always turned upon this identical point. Where remedies have been changed by statute, the only question has been whether the new or substituted remedy was less beneficial to the party entitled to enforce payment, than the old. And the courts have uniformly held that where the new remedy was equally beneficial with the old to the party entitled to enforce the contract, the obligation of the contract was not impaired.

In *Sturges v. Crowninshield*, 4 Wheat., 122, 197, Chief Justice MARSHALL said: "What is the obligation of a contract? And what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement by which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and that is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it wholly invalid, entirely discharges it."

And in *Fourth National Bank v. Francklyn*, 120 U. S., 747, 755, the court said of the statute there under consideration : "As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature, even as applied to debts contracted by the corporation before its enactment."

Evans v. Nellis, 187 U. S. 271, had to do with the statute of Kansas, passed in 1899 which made a radical change in the law of that state. Before that any creditor might bring an action directly against any individual stockholder, and recover his debt up to the amount of the stockholder's liability. The act of 1899 assumed to vest all right to enforce the liabilities of the stockholders in a receiver. As was said in *Hale v. Allinson*, in 188 U. S. 56, 65, it "made the stockholder's liability *an asset of the corporation*, to be collected by the receiver." Of such a change, depriving them of their direct right of action, existing creditors might well be heard to complain. As to this, and as to the validity and effect of the proceedings directed to be had for the ascertainment of the sum required to be collected from the stockholders, the court expressed no opinion, as no such proceedings had been taken, and therefore no foundation had been laid for the action.

The vested right of existing creditors to a direct remedy by action against an individual stockholder, when that remedy was in force at the time when the debt was contracted is recognized in many decisions.

Western National Bank v. Reckless, 96 Fed. 70, arose under the Kansas law as it was before the amendment of 1899, under consideration in *Evans v. Nellis*. The legislature of New Jersey had passed an act in 1897, providing that no action or proceeding should be maintained at law in the courts of that state to enforce the statutory liability of any stockholder created by the laws of any other state, and that such liability should

be enforced, only by suit in equity to which the corporation, all creditors, and all stockholders must be parties. Thus the same question was raised which was presented by the change of remedy in Kansas, itself. And it was held that the deprivation of the direct remedy of the stockholder was an impairment of the obligation of his contract.

And, upon the same principle, in *Hawthorne v. Calef*, 2 Wall., 10, where a charter granted by the legislature of Maine provided that the individual property of stockholders should be liable, and might be taken in execution upon a judgment against the corporation, it was held that a subsequent act which repealed this provision impaired the obligation of the contract between existing creditors and stockholders, and between existing creditors and the corporation, because it took away from *the creditors* an existing right.

But the change of remedy by the Minnesota Act of 1899, deprived the creditor of no such personal direct right of action against the stockholder, because no such right then existed under the laws of that state. It merely and simply expanded the remedy to meet the defects of the remedy as it then existed.

In *Commonwealth v. Cochituate Bank*, 3 Allen (Mass.) 42, the change of remedy was from a suit in equity by one or more of the creditors, against the stockholders, to an assessment upon stockholders, by receivers, under the direction or approval of the court. It was there said: "It will at once be perceived that no objection to a change of remedy can be successfully urged, on account of its being more speedy and effectual. That objection might be urged as to all changes in the forms of proceeding, or the organization of the legal tribunals to act thereon. Every statute extending the equity powers of this court would be obnoxious to objections of this character. The objection, to be tenable, must go beyond this, and show that the statute increased the actual liabilities of the stockholders, and was something more than a change in the mode of enforcing a pre-existing

liability. * * * The proceedings under the late statute may require the action of the court upon an estimated value of such assets, rather than an absolute ascertainment of the amount; but the principle to be applied is the same, varying only in the mode of arriving at the result as to the deficiency chargeable upon the stockholders."

Walker v. Crain, 17 Barb. 119 was an action brought by an individual creditor of a corporation against a single stockholder. The creditor had a right to this remedy of an action at law at the time when the debt was incurred. Subsequently the legislature passed an act (April 16, 1852) providing for the appointment of trustees in case of corporate insolvency, and directing the trustees to dispose of the corporate property, to assess deficiencies upon stockholders to the extent of their liability and collect the same, and to make distribution of any surplus among the stockholders. It was held that this act barred the individual action, just as a court of equity might do by injunction, to prevent preference and secure equality of distribution; that the direction to the trustees necessarily vested in them the title to the stockholders' liabilities; that the act was constitutional as the stockholder's obligation was not to pay one creditor to the exclusion of others, or to pay one creditor absolutely but to devote a "particular fund" an amount equal to the par value of the stock to the payment of all debts; and that the stockholder's obligation was not a contract with the corporation but rather a duty.

Equally in point is the language of this court in *Hill v. Merchants Ins. Co.*, 134 U. S. 515, 526, where the statute under consideration gave a direct remedy against an individual stockholder, when previously he could only be sued in common with other stockholders in a suit to enforce contribution. "His undertaking was to pay each and all of the notes on demand, and it was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf—such

remedy not increasing the debtor's liability. As said by this court in *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 580, the condition is implied in every grant of corporate existence that 'the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created.' * * * His liability to pay that amount has no such connection with the liability of other stockholders as to exempt him from a suit at law to compel him to pay the sum he agreed to pay. *Hatch v. Dana*, 101 U. S. 205. The statute restricts any judgment against him to the amount he originally assumed to pay. Consequently, no substantial right of his has been violated. 'Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract.' "

Story v. Furman, 25 N. Y. 214, presented the question of the validity of the New York Statute of 1852 in its effect upon the liabilities of stockholders under a statute of 1811, and is thus stated in the opinion: "The objections to this act under this head are, first, that it takes from the creditor the cause of action against the stockholders which the statute of 1811 gave him, and transfers it to a trustee under different circumstances from those under which the court of chancery would previously have interfered with his enforcing it." In discussing this question the court said: "The obligation of the contract consists in the agreement or duty of the stockholder under this act to pay to the creditors of the corporation upon its dissolution an amount sufficient to pay its debts to the extent of the respective shares of each stockholder in the said company. This is the contract of the stockholders, and this is its obligation. This statute does not in any way take away or release or discharge their liability. It in no way acts upon the contract itself.

It does not profess or propose to do so. On the contrary it clearly recognizes the binding force of the statute liability. It treats it as a subsisting and valid obligation. But it is claimed that it impairs the face of the obligation by acting upon the remedy. * * * Chief Justice TANEY, in *Remsen v. Kenzie* (1 How. U. S., 316) states the rule as follows: 'Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract, although a new remedy may be deemed less convenient than the old, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional.' This quotation, it seems to me, answers all the objections to the act of 1852, so far as they related to the remedy."

II. It has never been held that the debtor or party under obligation to pay by reason of his contract has any vested right to be pursued through one form of remedy rather than another. His obligation is to pay what he has undertaken to pay; neither more nor less than this.

In the present case the stockholders' contract is that they will be liable, in the terms of the constitution. They agree to assume the liability to that extent. That is the obligation of their contract. No change in the law which does not make them liable to any greater extent can be said to impair the obligation of their contract.

Now the objection to the validity of the Act of 1899 as impairing the obligation of the contract of the stockholders amounts substantially to this: That while they had contracted to be liable in the terms of the constitution, the Legislature of Minnesota, at the time when their obligation was incurred, had provided a remedy so ineffectual that so long as they absented themselves from that state they were immune; that it was an essential element of their contract that they would be liable, that they should be pur-

sued only by a remedy which was incapable of enforcement; that thus, in effect, it was a part of their contract to be liable that their liability should never be enforced; that, therefore, their contract to be liable was in fact a nullity; and that, accordingly, the creation of a remedy which could be enforced was the creation of a liability which did not previously exist.

The defendants' proposition is, thus, that it was perfectly competent for the legislature to provide a remedy which was ineffectual to enforce the obligation he entered into, and so could not reach them, and that, having done so, the legislature was precluded from further action; and that it was wholly incompetent for the legislature, on discovering the insufficiency of the existing remedy, to provide one which could reach them.

This argument has no support in either reason or authority. If it needs any refutation, that will be found in the decisions of this court, here cited.

Bronson v. Kinzie, 1 How. 315. "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract."

Terry v. Anderson, 95 U. S. 663. "It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remains."

Campbell v. Holt, 115 U. S. 627. "There are numerous cases where a contract, incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action. * * * In all this class of cases the ground taken is that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having for reasons of public policy been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract otherwise unobjectionable." This language was used with especial reference to the repeal of a statute of limitations by which, prior to that repeal, a debt had become barred. It was held that the debt still existed; that the bar of the statute was not a vested right; and that it was competent for the legislature to remove the bar by repealing the statute. As was said at page 628: "The right does not enter into or become part of the contract. No man promises to pay money with any view to being released from that obligation by the lapse of time."

City & Lake R. R. Co. v. New Orleans, 157 U. S. 224. "Modes of procedure in the courts of a state are so far within its control, that a particular remedy existing at the time of the making of a contract may be abrogated altogether, without impairing the obligation of the contract, if another and equally adequate remedy for the enforcement of that obligation remains, or is substituted for the one taken away." This, it is true, is said more directly of the rights of the creditor; but that it is equally true as regards the debtor is made clear by the further language: "One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is *designed only to enforce* performance of his obligation."

Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 439. "It is well settled that while, in a general sense, the

laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of proceeding then existing.

Waggoner v. Flack, 188 U. S. 604. "We cannot see any difference in principle between a case where an act was in existence when a contract was made, providing a certain remedy for a violation of the contract, and then after the contract is entered into, the legislature passes another act, giving an altogether different remedy, * * * and a case where an act which denied the remedy of forfeiture when the contract was made, was repealed by a subsequent enactment which provided a forfeiture as a remedy. In *both* cases there is a plain alteration of remedy, while in *neither* is there any contract springing from the passage of the first act that no other remedy *more effective* should be given as against one who purchased land during the existence of the statute."

As is said by Judge COOLEY, Constitutional Limitations, 356, "It is also equally true that where a legal impediment exists to the enforcement of a contract which parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would enforce and preserve it."

The precise question was raised in *Straw & Ellsworth Co. vs. Kilbourne Co.*, 80 Minn. 125, where it was held that *this* Act of 1899 did not violate any provision of the Constitution of Minnesota or of the Constitution of the United States; that there was no taking of property without due process of law; that the statute did not enlarge the liability, but merely provided a remedy; and that there was no vested right in any particular remedy. "No substantial right is affected by the law in question, for in no manner does it increase the liability of the stockholder."

III. If it be admitted that the stockholders had incurred any liability in becoming members of the corporation, then the Act of 1899 was really beneficial to them.

So long as personal liability exists, it is manifestly in the interest of justice, of justice to the stockholder especially, that it should be made effectual by distributing the burden among the several stockholders, wherever they may in fact reside. A direct liability of each stockholder to any creditor has been found to be productive of a great deal of hardship. In such case the creditors naturally seek out the stockholder of largest holdings and largest means, or the stockholder who by reason of his place of residence is most readily exposed to their attack, and pursue their remedies against him until they have exhausted the amount of his liability. And if the stockholder thus attacked is compelled to pay more than his equitable proportion of the debts, he is then compelled to pursue such of his fellow stockholders as he can find in order to enforce contribution by a new and expensive course of litigation, with all its risks and uncertainties.

The scheme of the Minnesota statutes, as brought to completion by the Act of 1899, is devised to secure an equitable and exact distribution of the burden of individual liability. Under it each stockholder is exposed to but a single suit, by a single representative of all the rights of the creditors, and is called upon only for the amount of his proportional share of the total liability, as nearly as may be determined. And he need be exposed to no suit whatever, if he recognizes his liability, and voluntarily discharges his obligation.

The purposes and frame of this scheme are ideal in their equity. And it is obviously essential to its successful working out that the amount of the collective burden, and each stockholder's proportion of that burden, should be judicially ascertained at the outset, once for all. It is equally obvious that the proper tribunal for such judicial ascertainment is a court of the state which has created the corporation, has imposed the

liability, and has provided the machinery for its enforcement. And it is equally obvious that the legislature of that state could neither confer the power, nor impose the duty, upon courts of other states to employ such machinery or methods as it has devised for working out these equitable results in its own courts for ascertaining as nearly as may be the extent to which the individual liability will need to be enforced.

This system, thus devised and made operative by the legislature of Minnesota, is distinctly a protection to the stockholder and a *limitation* of his liability. It is an equitable distribution of the burden, in advance, prior to any demand upon him for payment or contribution. And his more complete protection is ensured by the provision that if the collection of the assessment thus made shall realize more than the amount required to meet the obligations, the surplus shall be distributed *pro rata* among those who shall have contributed to the fund.

IV. The perfection of the remedy is to the advantage of the creditors, and does not impair the obligation of the contract as regards them.

Beginning with the decision in *Allen v. Walsh*, 25 Minn., 543, and up to the passage of the act of 1899, it was uniformly held that the liability of stockholders was to all the creditors in common, and that no creditor had the right to sue a stockholder at law, and recover the whole of his claim, while other creditors received nothing.

The cases, therefore, which hold that the creditor cannot be deprived, by change in the remedy, of his direct action at law against an individual stockholder, where that right existed when the debt was incurred, have no application.

As was pointed out in *Arthur v. Willius*, 44 Minn., 409, "An action against a corporation under Gen. Stat. 1878, c. 76 [reenacted as Chapter 76, Gen. Stat. of 1894] is in the nature of an action to wind up its affairs, to collect and convert all its assets, and appropriate them

ratably among creditors, and to enforce the individual liability of stockholders and others to the extent of the deficiency of assets. As was said in *Merchants Nat. Bank v. Bailey Mfg. Co.*, 34 Minn., 323, 'it is an action not proceeding in the ordinary way of actions at law by trial of simple issues, judgments and execution, but by the exercise of powers peculiar to the former courts of chancery.' "

Thus under the former act, as under the present law the sequestration proceedings were begun by one or more creditors, but enured to the benefit of all. Stockholders who might be found in Minnesota could be brought into the proceeding and compelled to contribute to make good the deficiency of assets, up to the amount of his individual liability. But stockholders who could not be found in Minnesota could not be reached at all, as was finally held by this court in *Hale v. Allison (supra)*.

It is difficult to see what substantial right the *creditor* is deprived of by an amendment of the law which makes the individual liabilities assets, and vests the title to them in the receiver, and authorizes him to enforce these either within or without the State of Minnesota. He loses the doubtful privilege of making himself trustee, at his own primary cost and risk, to bring in resident stockholders and to establish their liabilities whenever disputed. He gains the advantage of having that done through an officer of the court and under the responsibility of the court's direction, and at the direct expense of the assets; and he gains the further advantage of making available and enforcing the liabilities of non-resident stockholders who previously were practically immune.

It would be strange, indeed, if the *stockholders*, who by this change in the law have been stripped of their immunity, and have been for the first time put in the position where their agreed liability can be enforced, could urge, against that enforcement, the argument that the change was in derogation of the constitutional rights of the creditors; and this, while the creditors have proved their debts and accepted the benefit of

the change in the law, and see nothing in it but benefit to themselves.

It would be strange, indeed, if the stockholder when sued could say: "This action which is brought against us in the interest of the creditors, and to secure the payment of their debts, cannot be maintained because it is not so advantageous to the creditors as the remedy which it superseded,—and that remedy could not touch us at all."

POINT FOURTH. The assessment made by the Minnesota court under the Minnesota statute is conclusive upon the stockholders.

I. This would seem to follow as a necessary corollary from the propositions which are deemed to be already established.

If the members of the Minnesota Thresher Manufacturing Company in accepting incorporation at the hands of the legislature of Minnesota submitted themselves to the jurisdiction of that state in respect of all matters touching their rights and liabilities as members of the corporation to the jurisdiction of that state, and admitted themselves to be, and consented to be regarded as citizens of that state, *pro hac vice;* and if The legislature of that state, in providing a more perfect and effectual remedy for the enforcement of the liabilities which they voluntarily thus assumed, did not impair the obligation of their contract, or, in other words, did not increase that obligation beyond the terms of their contract, then it follows that the assessment levied upon them in conformity with the requirements of that legislation must be binding upon them.

This is not a new question. It has repeatedly arisen in the administration of the affairs of insolvent corporations.

The orderly and just administration in such cases

requires that some one court should conduct and control the proper and necessary proceedings for the adjustment, enforcement, and protection of the rights of all parties interested. To this end the machinery of a court of equity is indispensible. And to such court must be confided the duty of ascertaining the debts and obligations, of getting in the assets and resources available for their payment, and of directing the proper distribution.

It would be unseemly and intolerable if the parties interested could be subjected to the varied procedure and possibly inconsistent holdings of the different local tribunals where the different stockholders might be found, upon identical questions.

With a thousand stockholders liable, residing in a dozen different states, if each of were entitled to have tried, in his own jurisdiction, not only the question of his individual liability, as dependent on the fact of his membership in the corporation—which he may always dispute—but also the questions of the amount of the corporate debts and obligations, of the pecuniary responsibility of his fellow stockholders, of the extent of their liabilities, and of the proper and legitimate expenses of the administration, the realization of a fund adequate to meet the obligations could not be hoped within the average lifetime of the creditors, or stockholders, if ever.

It should be clearly recognized and constantly borne in mind that the levying of the assessment is not in itself a judgment against the individual stockholders. The ascertainment of the claims proved by creditors is in legal effect equivalent to so many judgments in favor of the creditors, against the corporation. Even here the stockholders have the right to intervene and to be heard upon the validity of the claims presented. If they choose to rely instead upon any supposed immunity from the enforcement of such claims as may be allowed, when attempted to be enforced against their individual liability, they do so at their own option, and at their own peril.

The ascertainment of the amount of corporate lia-

bilities and of the exhaustion of ordinary corporate assets relates purely to matters in which the corporation represents the stockholders and acts by their authority as their agent. The exhaustion of ordinary assets is sufficiently established, under a rule of universal application, by the return of an unsatisfied execution. The necessity for resort to individual liability being established, the determination of the extent to which that liability must be enforced is necessarily confided to the judicial discretion of the court having jurisdiction of the winding up of the affairs of the insolvent corporation.

This point being reached, there are but two alternatives. Either the full amount of the stockholders's liabilities must be enforced and collected, or some lesser amount, which the court in the exercise of its judicial discretion considers will realize the fund required to meet the corporate obligations. In either case the assessment is not a finality; for the contributing stockholders will be entitled to receive back their *pro rata* shares of any surplus remaining after the corporate obligations shall have been satisfied.

Thus the provision of the statute which authorizes the court to limit the amount of the assessment to such proportion of the individual liability as in its judgment will suffice for the purposes of the assessment is a distinct benefit and protection to the stockholders, and one of which they cannot be heard to complain.

If, then, the stockholder chooses to refrain from participating in the proceedings in which are determined the amount of corporate obligations, the exhaustion of ordinary assets, and the extent to which it is necessary to resort to individual liabilities, in all of which matters he is primarily represented by the corporation, he has still, when sued by the receiver for the amount of his assessment, his day in court upon any defenses which belong to him individually.

In *Great Western Telegraph Co. v. Purdy*, 162 U. S., 329, 336, this court held that an assessment for amounts collectible of stockholders under their contract in

becoming members of a corporation "was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and *to that extent* bound every stockholder, without personal notice to him." "But," the court adds, "the order *was not*, and did not purport to be, *a judgment against any one.* It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount."

It is thus clear that the objection that the order is a judgment against the stockholder, without giving him his day in court, is not tenable.

The propriety and necessity of the proceedings to obtain such assessment are equally obvious. In the kindred case of stockholders in national banks it was fully recognized in *Kennedy v. Gibson*, 8 Wall. 498, 505, where it was said: "It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders."

Converse v. Stewart was an action in the New York Supreme Court by the same receiver who is plaintiff in the present action against another stockholder in the same Minnesota Thresher Manufacturing Company. Hon. WILLIAM G. CHOATE, the referee before whom that case was tried, said in his decision: "The courts of the home state must certainly be competent to entertain jurisdiction if the legislature of the state sees fit to confer it on them, of any proper remedial proceedings for the winding up of an insolvent corporation, the ascertainment of its debts, the applica-

tion of it assets to the payment of its debts and the determination of the amount which the stockholders should contribute towards the deficit in cases where by the law under which they became stockholders they impliedly contracted to pay, such contributions being in effect assets to which creditors can resort."

The conclusiveness of the assessment thus made, as to its necessity and amount, is affirmed in *Great Western Telegraph Co. v. Purdy (supra)* and in many other cases.

The decision in *Straw & Ellsworth Co. v. Kilbourne Co.*, 80 Minn., 125, 136,—under the act of 1899—is directly to the point. "The order of assessment is, under section 5, conclusive upon all the stockholders, so far as it decides the amount of assets and liabilities of the corporation before the court, and is conclusive as to the necessity of making an assessment to the extent and in the manner ordered. All the cases last cited sustain the proposition that as a member of the insolvent corporation, the shareholder is bound by the decision of the court of the state where it was organized, made in administering on its affairs in an insolvency proceeding and when determining the amount of its assets and liabilities and the amount of an assessment to be made upon the stockholders, and that collection of the amount can be enforced wherever such stockholder is found." This decision points out the similarity between the assessment thus authorized and that authorized in the case of an insolvent national bank, the difference being that "under the latter the assessment is made by the comptroller of currency, while here the assessment is made by the court in insolvency proceedings."

In *Howarth v. Lombard*, 175 Mass. 570, 575, (already cited) it is said of the liability of the stockholders of a Washington corporation: "Inasmuch as the nature of it and the method of enforcing it depend upon the statute which enters into the implied contract, we must look to the statute to ascertain its extent and the manner of enforcing it. If it is of such

a nature as to call for local proceedings in the state where the corporation is, *in order to adjust equities*, such proceedings *must be had*, and it cannot be made effectual without them. Most of the cases in which creditors of foreign corporations have been refused relief in this commonwealth have shown rights which, under the statutes creating them, could not properly be enforced without proceedings in the foreign state whereby equities could be adjusted. In the present case, as the statute has been construed, it is plain that no action can be maintained against a stockholder *until after* proceedings in a court of Washington, showing the insolvency of the corporation and the need of payment to satisfy the claims of creditors. After such proceedings, and an adjustment of the rights and liabilities of the corporation, of creditors, *and of stockholders*, collection can be made from stockholders wherever they are found."

In this same decision in *Howarth v. Lombard* the court goes on to add (pp. 576–578): "Under the statute the stockholders impliedly agreed that if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, *and that if they were needed* they would also pay their proper share, up to the amount of their subscriptions, to the trustees of *this additional fund*, for the benefit of creditors. The determination of the questions involved are a part of the proceedings of the court in the administration of the affairs of a local insolvent company. The court of Washington, acting under its general authority in such administration, *is the only tribunal* which has jurisdiction to determine the amounts due creditors and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations themselves, *are within the jurisdiction* of the local court so

far as is necessary for the determination of the rights and liabilities of the corporation, and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation."

A similar question was presented in *Upton, assignee, v. Hansbrough*, 3 Biss. 417, 426, where, upon objection to an assessment made by the court upon the stockholders of a bankrupt corporation, that the order was made without notice to the stockholders, the court said: "I think the stockholders, who are the integral parts of the corporation, may be considered as *quasi* parties to the bankruptcy proceedings to such extent as to be bound by the order without notice. If they were dissatisfied with the order, they, by their relation to the bankrupt corporation, had such a standing in the bankrupt court as enabled them to move in that court to set aside the order, if improvidently made, or to apply for a review in the Circuit Court under section two of the bankrupt act. Having omitted their plain rights in that respect they are concluded by the order in these suits. It was suggested by some of the counsel that the call was for more than was necessary to pay the debts of the company. That question cannot be tried in this case. The order of the district court, it having jurisdiction over that matter, is conclusive. Lord ELDON says in *Ex parte Hewdry*, 15 Vesey 498, 'that a commission in bankruptcy is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment.' * * * If the chancellor in such a case could authorize his receiver to make a valid assessment collectible by the receiver at law, I think a court of bankruptcy could do the same."

In re Republic Ins. Co., 3 Biss. 452, holds that the bankrupt court had power to assess stockholders for the amount required for the payment of debts and the expense of closing up the corporate affairs; and that such assessment was the foundation of actions at law

by the assignee to recover the amounts of the assessments from the stockholders.

Under the National Banking Act, stockholders are made individually liable (U. S. Rev. Stat. Sec. 5151), in substantially the same terms as those contained in the Constitution of the State of Washington; and it is provided in the National Banking Act, (U. S. Rev. Stat. Sec. 5234,) that in case of the insolvency of the corporation the Comptroller of the Currency may appoint a receiver, who, under his direction, "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

Thus the same power is conferred upon the comptroller in the case of national banks, as that conferred upon the courts of Washington and of Minnesota in the case of corporations of those states. Like powers and duties are conferred and imposed, in both cases, upon the receivers, when appointed. In the one case the receiver acts under the direction of the comptroller, in the other case under the direction of the court. The function of the Comptroller and of the court are equally judicial, in determining the questions confided to the exercise of their judgment and discretion. The purposes to be accomplished in either case are the same. And in both cases is involved the question of the necessity of calling upon stockholders under their added, or individual liability, as well as under their unpaid subscriptions for stock.

The two obligations of the stockholders arise out of the identical contract assumed by them in becoming members of the corporation. In that contract they severally agree to be liable for the amount of their subscriptions, and for such added amount, within the limits fixed, as may be necessary to discharge the obligations of the corporation. So long as the stockholder is only held liable within the limits of this contract, it is no concern of his through what instrumentality that liability is enforced.

The ascertainment of the preliminary facts, in the case of each branch of this liability, must be made

through the same procedure, and to the same end. In respect of both purposes it is equally essential that it be judicially determined what deficiency of assets exists, what individual liability exists, available for meeting such deficiency, and to what extent it is necessary to resort to individual liability.

There is, therefore, no more ground for asserting the right of the stockholder to be personally brought into court upon the levying of an assessment on one branch of his liability than upon the levying of an assessment on the other branch. Both proceedings equally affect his personal rights. Both must proceed upon the same *data* and in the same manner. In both cases the stockholder requires and is entitled to exactly the same protection. In many cases he may be liable upon both grounds. In the case of his liability for unpaid subscriptions his protection is assumed to be afforded by the sanctity of the judicial action of the tribunal which levies the assessment. He has the same protection in the case of his superadded liability.

In *Kennedy v. Gibson*, 8 Wall. 598, 505, which arose under the National Banking Act, the court said: "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, *how much shall be collected*. These questions are referred to his judgment and discretion, and *his determination is conclusive*. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such *data* as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and *must precede* the institution of suit by the receiver."

This decision was emphatically reaffirmed in *Bushnell v. Leland*, 164 U. S. 684, as long settled, and not open to further discussion. It is therefore needless to cite the numerous intervening decisions to the same effect.

In *Bailey v. Sawyer*, 4 Dillon, 463, it was said, in the case of a stockholder of a national bank that "the comptroller, in the exercise of a *judicial* discretion, decides upon the *data* before him when 'it is necessary' to compel contributions from stockholders to pay the debts of the bank."

The same "judicial discretion" which is confided in the comptroller by the statutes of the United States is confided in the courts of Minnesota and of Washington by the statutes of those states.

In *Hawkins v. Glenn*, 131 U. S. 319, *Glenn v. Liggett*. 135 U. S, 393, and in numerous other cases, it had been decided that in case of an assessment laid by the court upon the stockholders of an insolvent corporation by reason of their liability upon stock held by them which had not been paid in full, the order or decree of the court levying the assessment could be made without the presence of the stockholders and without service of notice or process upon them. *In Hawkins v. Glenn* it was said: "A stockholder is so far an integral part of the corporation that, in view of the law, he is a privy to the proceedings touching the body of which he is a member," citing its own language in *Sanger v. Upton*, 91 U. S 56: "It is not necessary that the stockholders should be before the court when it [the order] was made, any more than that they should have been there when the decree of bankruptcy was pronounced. The decree gave the jurisdiction and authority to make the order." It was added: "As against creditors, there is no difference between unpaid stock 'and any other assets which may form part of the property and effects of the corporation.'"

And in *Hancock Nationvl Bank v. Farnum*, 176 U. S. 640, 643, it was said: "This representative character of the corporation has been affirmed by this court several times. In *Hawkins v. Glenn*, 131 U. S. 319, it was held that 'in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack.' This was a case in which an

assessment ordered by a court which had jurisdiction of the corporation was held *binding* upon stockholders residing in another state."

In *Howarth v. Lombard (supra)* the Supreme Court of Massachusetts said: "That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided. * * * Under the statute now before us [of Washington] we can see no difference in principle between the secondary and primary liability. * * * in reference to each the subscriber for stock contemplates the *same* kind of proceedings, and a collection by the same officer, who represents not only such assets as the corporation has for all purposes, but the right to a special fund, which is an asset, that can be collected and used for creditors only." The secondary fund thus referred to was the individual liability of stockholders, beyond the amounts due from them for balances unpaid on their subscriptions; and it was held that the assessments were equally binding upon the stockholders in both cases, and upon the same principle.

Similarly, in *Howarth v. Angle (supra)* the New York Court of Appeals said: "There is *no* substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take stock and pay for it, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stocks may be owned."

II. It is no objection to the assessment that the expense of realizing and administering the fund is taken into account and provided for.

The purpose of imposing an individual liability upon stockholders is the payment of the corporate obligations, in full. To carry out that purpose it is essential that the stockholders should either voluntarily or under

compulsion contribute an amount sufficient to make such payment, over and above the expense of collecting and administering the fund. Otherwise the purpose will be defeated, for the fund will not realize itself. That must be accomplished through human agency and labor, which must be paid for.

If the stockholders recognize their legal obligation, and pay without contest, then the expense of actions for collection is eliminated. If they choose to defend and thus to put the receiver to the expense of litigation, they have only themselves to blame for the added cost. And where they have united, as here, in a common liability, those who, by contesting the right of the receiver, add the cost of litigation to the cost of administration, as do the defendants in these actions, have no ground of complaint on that score.

The Minnesota constitution does not limit the liability to corporate debts, strictly so called. The language is broad and general. "Each stockholder in any corporation *shall be liable* to the amount of stock held or owned by him." The section is entitled, "Liabilities of stockholders." This is the only declaration, definition, and limitation of these liabilities. There is no limitation as to the character of the liabilities, but only as to the amount. And the use of the plural form "liabilities," is significant.

The only reasonable interpretation of this language is that the liabilities declared and imposed are co-extensive and co-terminous with the obligations of the corporation, and of the obligations of the corporate assets, of which they form a part.

As the stockholders' liabilities constitute a fund for the payment of creditors after the ordinary assets are exhausted, being, in the language of *Howarth v. Angle (supra)*, "a substitute, required by statute, for the personal liability of a partner at common law," and, in the language of *Howarth v. Lombard (supra)*, "this additional fund, for the benefit of creditors," the aggregrate amount of the fund must be such as to be adequate to that purpose, within the limits of the individual liabilities as fixed by the constitution. As

was said in *Trustees v. Greenough*, 105 U. S., 527, 532, "It is a general principle that a trust estate must bear the expenses of its administration." And the same rule was applied in *Helm v. Smith-Fee Co.*, 79 Minn., 297.

So long as the trust estate is adequate to the expenses of its administration as well as to the payment of ordinary corporate obligations, those expenses should not be suffered to diminish the amounts payable, and justly due, to the creditors.

It should not be forgotten that this fund is not simply the amount of the assessment laid, but is the sum total of the individual liabilities; and the purpose of levying the assessment is to obviate the necessity of actually getting in any greater part of the fund than appears requisite to meet the proper demands upon it.

There can be no question that the expense of a receivership, of the getting in of the assets, and of the administration and distribution of the fund realized, is a proper charge upon the assets of an insolvent corporation. In every scheme for winding up an insolvent corporation such expense is a necessary and essential element to be reckoned with, whether it be in bankruptcy, or under a state system of insolvency, or through the general powers of a court of equity. And it is well known that the courts frequently go so far as to authorize receivers to issue certificates to raise money for such expenses, making such certificates a first lien on the assets.

Clevenger v. Moore, 12 Am. Bank. Rep. 738 was a suit at law brought by a trustee in bankruptcy against a stockholder of a bankrupt corporation to recover the whole amount unpaid on his stock, under the order of the Untted States District Court, directing an assessment of that amount. It was held that the propriety or validity of that assessment could not be questioned collaterally; and that where such assessment has been made by a court having jurisdiction "an action at law may be brought against a stockholder to collect his

quota." Clearly the expense of the recovery and of the administration of the estate of the bankrupt was a proper charge upon the fund so realized.

In *Cumberland Lumber Co. v. Clinton Hill Co.*, 57 N. J. Eq. 627, where the affairs of an insolvent corporation were in course of administration by the Court of Chuncery, it was held that stockholders were liable for "so much of what is unpaid on the stock as will satisfy the claims of corporate creditors, *and meet the expenses of winding up its affairs*;" and that when an assessment has been ordered by the court to meet such corporate liabilities, and an action is brought thereon against a stockholder, "he cannot there question the validity of the assessment."

In *Harper v. Carroll*, 66 Minn. 508, this very question was raised, and the court answered it as follows: "Some of the appellants contend that while the creditors are entitled to recover the amount of their claims, with interest and statutory costs and disbursements, from the stockholders, the latter cannot be required to pay any additional amount of costs and expenses. We cannot so hold. The statute provides for the appointment of a receiver, and this implies that his expenses may be recovered in addition to the above amounts, not exceeding the amount of the statutory liability of of the stockholders."

In *Converse v. Stewart*, above referred to, Judge CHOATE said: "I think it may also be very fairly contended that these expenses attending the proceedings against a corporation and its stockholders for the liquidation of its affairs, are in the nature of costs, and primarily an obligation of the corporation itself, for which the stockholder is bound under the constitution. The appointment of a receiver for the purpose of liquidating the affairs of an insolvent corporation is a common and proper mode of accomplishing that end, and, ordinarily, the fees and expenses of the receiver are paid out of the assets of the insolvent estate; and the court appointing the receiver is the proper court, indeed, properly the only tribunal to pass on the question of the receiver's fees and expenses. Thus these

expenses are a mere incident of the receivership and of the remedy prescribed by the legislature of Minnesota."

And in *Richmond v. Irons*, 121 U. S. 27, 65, the court, referring to an involuntary liquidation of a national bank under the supervision of the Comptroller, said: "The receiver appointed by him is the only person authorized to enforce the liability of the stockholders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, *of course*, include the *costs and expenses* incurred by him in the performance of these statutory duties."

These expenses were not in fact in any sense an additional obligation created by the act of 1899 but were a recognized and established part of the stockholders' liability under the remedies which existed before that act was passed.

Frost v. *St. Paul Bank & Invest. Co.*, 57 Minn. 325, was decided in 1894. It is there said: "Newton R. Frost having recovered two judgments against the corporation defendant instituted proceedings against it, under 1878 G. S. ch. 76, Section 9, making these appellants and other stockholders of the corporation codefendants, for the purpose of enforcing their liability for unpaid subscriptions and their statutory liability. Another creditor of the corporation came into the proceeding, proved his claim and such proceedings were had that the court entered a decree establishing the claims of Frost and of the other creditor; appointing a receiver determining the liability of each of twelve stockholders, defendants, including appellants, on unpaid subscriptions and the amount thereof, and the statutory liability of each and the maximum amount thereof; directing the receiver to convert the property, things in action, stock and assets of the corporation, into money, and collect the amount for unpaid sub-

scriptions determined to be due from each stockholder, and out of the proceeds of such sales and collections to pay the costs and disbursements in the action, the *charges of executing the trust*, and to pay said claims and to make report to the court, stating the amount realized and so paid by him. And if, then, there shall remain a part of the claims unpaid, it directs that each stockholder defendant pay upon his statutory liability such proportion of the deficit as his stock bears to the aggregate par value of all the stock of all the stockholders, defendants; and it also provides for a reapportionment of the amount so to be paid, if the share of one or more of the stockholders cannot be collected, by reason of insolvency." The judgment thus set forth in the opinion of the court, was affirmed.

In *First Nat. Bank v. Winona Plow Co.* 58 Minn. 167, it was said: "Neither the constitution nor the statute provides that the stockholder's liability shall be only ratably to the amount of his stock, but 'he shall be liable to the amount of stock held or owned by him'. This is the limitation on his liability, and the court cannot add by construction the additional limitation that he is liable only 'ratably' when some of the stockholders are insolvent or beyond the jurisdiction of the court."

Thus it is clear that the stockholder's *liability* for the expenses of administration was not a creation of the act of 1899, but existed long prior to that time. The act of 1899 merely provided a remedy by which that existing liability could be enforced when the stockholder could not be found within the state.

POINT FIFTH. The stockholder's liability is statutory as well as contractual.

The Constitution of Minnesota, being, as has been shown, self executing, has all the effect of a statute. It differs from an ordinary statute only in the fact that

it is directly enacted by the people of the state, in the direct exercise of their sovereignty, instead of through the interposition of their legislature.

In *Walker v. Crain*, 17 Barb. 119, it was argued in the opinion of the court that the obligation of a stockholder was not a contract with the corporation and was not a contract within the meaning of that word in the constitution. "It appears on the contrary to spring from and to rest upon the enactment of the statute solely. It is a *duty* because the *statute* has enjoined it and not because the parties have entered into a contract to perform it. Judge Story says (1 Mason 243), 'Whatever is enjoined by a statute to be done creates a *duty* on the party which he is bound to perform. When, therefore, a statute declares that a stockholder in a bank shall pay a debt due from a bank under certain circumstances, and those circumstances occur, it creates a direct and immediate obligation to pay it.'"

In *Christopher v. Norveml*, 201 U. S. 216, 228–229, a married woman, resident in Florida, was sued as a stockholder in a national bank for the amount of an assessment ordered by the Comptroller of the Currency. It was set up in her defence that under the laws of Florida a married woman could not bind herself personally by contract, and that therefore the action against her could not be maintained.

This court, in its opinion, after citing several Florida cases upon the inability of a married woman in that state to enter into a contract, said: "But those cases are not in point here; for, in each of them, the personal liability attempted to be imposed upon the married woman arose *entirely* out of contract, express or implied, on her part, and not by force of any statute. * * * Her liability for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a stockholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, *the statute* creating liability against each stockholder, in whatever way he may have became such. There have been cases in which there appeared such elements of

contract as were deemed sufficient, in particular circumstances, to support an action. *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 372; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 565, 566; *Matteson v. Dent*, 176 U. S. 521. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute." Then, citing from *McDonald v. Thompson*, 184 U. S. 71,—"In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association,"—this court added: "All shareholders of stock in national banks become such, subject to the condition, declared by statute, that liability, to the extent of their shares, is imposed upon them for the contracts, debts and engagements of the bank. The statute, in effect, says to all who became owners of national bank stock, no matter in what way they became stockholders, that they cannot enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts and engagements of the bank. In other words, the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by stockholders."

This is as true of the operation and effect of the Minnesota Constitution as it is when spoken of the operation and effect of the National Banking Act. Individual liability is an original and essential element of the corporate existence; not something extrinsic and superadded by an arbitrary fiat, but a duty inseparable from membership, and a duty which each stockholder necessarily assumes, and voluntarily assumes, in the very act of becoming a stockholder.

And so the stockholder, having accepted the benefit, and having assumed the correlative duty, should be estopped to deny the right of the state to compel full performance of that duty through such means as may be appropriate or may be found necessary to that end.

And nothing short of full performance should be permitted to exonerate the stockholder.

Surely the stockholder cannot be heard to complain that his constitutional rights are invaded by the substitution of an adequate remedy for the enforcement of his duty, in place of a remedy which experience had demonstrated to be wholly insufficient.

POINT SIXTH. The judgments should be affirmed.

WILLIAM G. WILSON,
C. A. SEVERANCE,
Of Counsel.

APPENDIX.

The following is so much of the opinion of the Hon. WILLIAM G. CHOATE in the case of Converse, Receiver, v. Stewart, in the Supreme Court of the State of New York, as considers and discusses the questions involved in the present cases.

Opinion.

* * * * * *

The right of a plaintiff, a receiver appointed for that purpose in another state, to enforce this liabitity in behalf of creditors, under a statute such as that of Minnesota of 1899, cannot, I think, be successfully denied (Howarth v. Angle, 39 App. Div., 155; s. c. 162 N. Y. 179).

The plaintiff in this case is as clearly a *quasi* assignee of the cause of action for the benefit of creditors as was the plaintiff in that case under the laws of Washington.

Moreover the litigation in the Federal Courts in which the Minnesota act of 1899 and the prior act of 1894 have been the subject of inquiry, has reached this result as it seems to me that a receiver duly appointed under the act of 1899 can maintain an action to recover against the stockholder in an action at law in another state (Burget v. Robinson, 113 Fed. Rep. 669; 188 U. S. 739; 123 Fed. Rep. 262; Hale v. Allinson, 188 U. S. 60; 181 U. S. 619; Evans v. Nellis, 187 U. S. 271; Hale v. Hardon, 89 Fed. Rep. 283; same case, 95 Fed. Rep. 747; Hale v. Hilliker, 109 Fed. Rep. 273; Hilliker v. Hale, 117 Fed. Rep. 220; Finney v. Guy, 189 U. S. 335).

These cases show that while under the prior act of 1894, the receiver appointed by the Minnesota Court

was held to be simply an officer of the court and not a *quasi* assignee of the cause of action, the receiver under the Act of 1899 was such a *quasi* assignee and vested with such title to the claim against the stockholder that he could maintain the action to recover the assessment in any jurisdiction.

It is objected further by the defendant that the assessment in this case was laid to cover not only the original debt, but the receiver's expenses incurred and to be incurred and the fees of the receiver and of his counsel in Minnesota and elsewhere, and it is insisted that these expenses are not part of the debt due from the corporation for which the constitution makes the stockholder liable and which the stockholder may have impliedly contracted to pay by his becoming such stockholder and that this being so the Act of 1899 is unconstitutional as impairing the obligation of the contract of the defendant and taking his property without due process of law in violation of the Constitution of the United States and of that of the State of New York. It is further claimed by the defendant that as he was not brought within the jurisdiction of the court at the time of the hearing and proceedings for the determining of the amount of the assessment he is not concluded as to contest the reasonableness and amount properly chargeable for these expenses of the receiver.

The question whether the addition of these expenses under the Act of 1899, impairs or makes more onerous the obligation of the defendant's contract depends, in the first place, upon whether these additional expenses with his share of which he is charged by the proceedings, is an obligation of the corporation for which, whenever afterwards incurred, he became bound under the Constitution of Minnesota by becoming a stockholder, or in the second place if not properly regarded as an obligation of the corporation whether the imposing of these expenses as a part of the scheme for the winding up and liquidation of the affairs of the company was merely a proper part of a remedial system for the enforcement of the debts of the corporation. In either case this

defense must fail. The proceeding, it seems to me, under the Act of of 1899, taken as a whole and including this provision about the appointment of a receiver and providing for the payment of his fees and expenses, is simply a new remedy for the enforcement of the stockholders' liability which it was competent for the legislature of Minnesota at any time to enact.

The same objection was made in the case of Straw & Ellsworth Mfg. Co. v. Kilbourne Boot & Shoe Co., 80 Minn. 125, same case, 83 N. W. Rep. 36; and carefully considered by the Supreme Court of Minnesota and overruled on the ground that the scheme of the Act of 1899 was remedial only, for the purpose of enforcing the constitutional obligation and effected no substantial change in that obligation. This decision was approved by Judge LOWELL in Robinson v. Brown, 126 Fed. Rep. 429.

I think it may also be very fairly contended that these expenses attending the proceedings against a corporation and its stockholders for the liquidation of its affairs are in the nature of costs and primarily an obligation of the corporation itself for which the stockholder is bound under the constitution.

The appointment of a receiver for the purpose of liquidating the affairs of an insolvent corporation is a common and proper mode of accomplishing that end and ordinarily the fees and expenses of the receiver are paid out of the assets of the insolvent estate (See Harper v. Carroll, 66 Minn. 487, s. c. 69 N. W. Rep. 613). And the court appointing the receiver is the proper court, indeed properly the only tribunal to pass on the question of the receiver's fees and expenses. Thus these expenses are a mere incident of the receivership and of the remedy prescribed by the legislature of Minnesota. So also the remedial system adopted by providing for payment of the excess of debt over assets by an equitable assessment on the stockholders is an appropriate and just method for a final winding up of the affairs of the corporation. It is not an unusual remedy and is far more considerate

of the rights and interest of individual stockholders than separate actions at law against them by creditors.

As regards the claimed right of the defendant to contest the propriety of the addition of the expenses—their reasonableness, etc., and the necessity for and proper amount of the assessment—I think the weight of authority is that on questions of this character he, as a stockholder, is bound by the judgment in that respect in the proceeding against the corporation.

The learned counsel for the defendant cites a passage from the opinion of the court in the case of Howarth v. Angle, 162 N. Y. 188, where the court say:

"The stockholders, however, may controvert in our courts all the essential facts, such as insolvency, the amount of the deficiency and the like, whether they are established by the judgment appointing the receiver or not. They may require strict common law proof as to all the facts upon which the deficiency is based, and may contest any unreasonable expenditure in the conversion of assets and the collection of accounts, including extravagant allowances to attorneys or counsel. Upon all these questions the defendant has had his day in the courts of this state, and the united action of the courts below have conclusively determined them against him."

In the view which the Court of Appeals took of the record before them these questions were not open upon the appeal, having been passed upon by the court below and affirmed by the unanimous opinion of the Appellate Division (p. 185). The question therefore to what extent these issues would have been open to contest if not thus conclusively determined as matters of fact against the defendant in the court below was not a point essential to the decision of the Court of Appeals; and with all respect for this dictum of the Court of Appeals, I think the weight of authority is that the stockholder is concluded by the judgment of the court in the proceeding against the corporation; that in such corporate matters he is in fact represented by the corporation and in law bound as a privy. (See Glenn

v. Liggett, 135 U. S. 533, 544; Howarth v. Lombard, 175 Mass. 570; s. c. 56 N. E. Rep. 888, 890, 891, and cases there cited; Childs v. Cleaves, Sup. Ct. of Maine, 50 Atl. Rep. 714).

The courts of the home state of the corporation must certainly be competent to entertain jurisdiction, if the legislature of the state sees fit to confer it upon them, of any proper remedial proceeding for the winding up of an insolvent corporation, the ascertainment of its debts, the application of its assets to the payment of its debts and the determination of the amount which the stockholders should contribute towards the deficit in cases where by the law under which they become stockholders they were made liable and which by becoming stockholders they impliedly contracted to pay, such contributions being in effect assets to which creditors can resort. Such obligations of stockholders are not penal, but contractual in their nature (Whitman vs. Oxford Nat. Bank, 176 U. S. 559). And it has been so held by the Supreme Court of Minnesota (Hanson vs. Davison, 76 N. W. Rep. 254, 255).

The real question here is, what effect are the courts of New York bound to give to the judgment or decree of the court of Minnesota. If the statute of Minnesota is constitutional in that it does not impair the obligation of the contract, and the appointment of a receiver with the usual incidents of such appointment and the laying of an assessment on the stock constitute a proper remedy in such a proceeding, and the judgment pronounced in the proceeding referred to determining the amount of the assessment required for the payment of the debt is, by the law of Minnesota, a conclusive judgment binding upon the stockholders, although they were not personally parties to the proceeding in that state, then the judgment must have the same effect in the State of New York (See Nat. Bank vs. Farnum, 176 U. S. 640).

The statute of Minnesota is explicit that the judgment of the court with regard to the required assessment in this proceeding against the corporation shall bind all stockholders, leaving open to a person sued as

a stockholder elsewhere the question whether he is a stockholder and for how many shares, and whether he has in any way paid the claim in whole or in part or has an offset to the same. Such a proceeding is a proceeding *in rem* or an insolvency proceeding against the corporation in which all its stockholders are as it seems to me, deemed in law present and represented through the corporation, and concluded by the result so far as respects the necessity and amount of the assessment.

The practical effect of holding this question of the amount of assessment open notwithstanding the judgment in the court of Minnesota would be that in any jurisdiction it would be open to any stockholder to contest the reasonableness of the receiver's expenses or fees or the necessity, propriety or amount of the assessment made in that proceeding upon the stockholders for the payment of the debts of the corporation. This would virtually defeat the principal purpose of the Act to have a final liquidation of the affairs of the corporation made in one proceeding. If such liquidation cannot be had in the state where the corporation exists it would seem that it cannot be had anywhere. Certainly the courts of this state in an action against a stockholder would not have before them or within their jurisdiction the necessary parties to determine these questions. The corporation itself would seem to be a necessary party. Virtually the defendant claims the right to have the case in the Minnesota court retried as to its principal issues in this action against him. The defendant's answer also raises no issue as to the reasonableness of the receiver's expenses and there is certainly no evidence of their unreasonableness which would justify the conclusion if the point were open that the foreign judgment is being enforced unjustly against a citizen of this state or that the enforcement violates the public policy of this state (Bank of China v. Morse, 168 N. Y. 458, 481, 482). It would seem that any surplus of the assessment not required for the final liquidation equitably belongs to and could be recovered by the

stockholders contributing it. The liability has been construed to mean not a mere *pro rata* liability in proportion to the shares held, but a liability up to the amount of stock held if in fact required for the security of creditors (Bank v. Plow Co., 58 Minn. 167, 59 N. W. 997). So that it is necessary for the court in determining the amount of assessment to make allowance for the probable inability of some stockholders to respond to the assessment.

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WM. G. CHOATE,
Referee.